

FILED*08 MAR 25 15:28 USDC-ORP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DARCIE HANSEN,)	
)	No. 07-247-HU
Plaintiff,)	
)	
v.)	
)	OPINION AND ORDER
)	
ADVO, INC.,)	
)	
Defendant.)	

Sara L. Allen
Michael D. Hallas
Allen2 Law, LLC
811 S.W. Naito Parkway, Suite 420
Portland, Oregon 97204
Attorneys for plaintiff

Scott Osborne
Mark Crabtree
Jackson Lewis LLP
806 S.W. Broadway, Suite 400
Portland, Oregon 97205
Attorneys for defendant

HUBEL, Magistrate Judge:

Darcie Hansen brings this action against her former employer, Advo, Inc., asserting claims for sex discrimination, sexual harassment, and retaliation in violation of Title VII, 42 U.S.C. §

1 2000e and Or. Rev. Stat. § 659A.030, and a common law claim for
2 intentional infliction of emotional distress. She seeks back pay
3 and front pay; emotional distress damages; punitive damages; and
4 attorney's fees and costs.

5 **Factual Background**

6 Advo is a direct mail company that employs approximately 3,700
7 people at about 57 locations. Advo is headquartered in Windsor,
8 Connecticut. Advo hired Hansen on September 7, 2004 to work in its
9 Portland, Oregon sales office; Hansen worked for Advo until the
10 first week of March 2006, a period of about 17 months.

11 During Hansen's employment, the Portland office was managed by
12 a District Sales Manager, Tim Townsend. The District Sales Manager
13 is responsible for managing the sales officers and directing other
14 office personnel. Townsend was Hansen's supervisor. Human resources
15 (HR) personnel are not present at every Advo facility; during
16 Hansen's employment, the HR professionals assigned to the Portland
17 office worked out of Advo's San Francisco and Los Angeles offices.

18 From approximately August 2003 to December 2, 2005, the HR
19 professional assigned to the Portland office was Dewayne Quock, who
20 worked in the San Francisco office. After December 2, 2005, Emanuel
21 Maxwell replaced Quock as HR professional for the Portland office.
22 Besides Townsend and Hansen, the only Advo employees in the
23 Portland office during Hansen's employment were Regional Account
24 Executives (RAEs), Kenneth Niebur, Richard Cronkrite and Roger
25 Fune. Another RAE, James Barner, worked for Advo during part of the
26 time Hansen was employed there, but was laid off in May 2005. The
27

1 RAEs did not supervise Hansen.

2 Hansen asserts that she was told at the time of her job
3 interview with Townsend that her job title was to be "Sales and
4 Marketing Assistant." Hansen Declaration ¶ 1. As evidentiary
5 support for this statement, Hansen attaches business cards made for
6 her by Advo, which give her title as "Marketing and Sales
7 Assistant."

8 Emanuel Maxwell, Advo's HR person for the Portland office,
9 states in an affidavit that Hansen's job title was "Sales
10 Administrative Assistant," Maxwell Declaration, ¶ 7, but the
11 position description attached to Maxwell's affidavit and cited as
12 evidence for that statement merely identifies the job as
13 "Assistant." Maxwell Declaration Exhibit C. The duties described in
14 the position are consistent with those of an administrative or
15 office assistant, including calendar coordination and management
16 for the office manager; organizing and coordinating meetings;
17 directing incoming and outgoing correspondence; composing routine
18 responses to correspondence; taking meeting minutes and notes;
19 researching and compiling routine reports, creating presentations
20 and reports; handling travel arrangements for the office manager;
21 acting as liaison for manager and staff; monitoring invoices and
22 budget activity; preparing budget variance reports and expense
23 reports; and handling filing. Id.

24 Hansen states in her declaration that she has never seen a
25 copy of the job description attached to Maxwell's declaration, and
26 that she was not described as a "Sales Administrative Assistant."

27

28 OPINION AND ORDER Page 3

1 Hansen Declaration ¶ 2. Hansen does not deny that she was the only
2 "assistant" in the Portland office.

3 Townsend states in his declaration that Hansen had expressed
4 an interest in marketing, and that over the course of her
5 employment she was given tasks with a marketing or sales component,
6 including responsibility for maintaining client relations with
7 three of Advo's larger regional accounts, working with them to
8 develop marketing plans. Townsend Declaration ¶ 2. Townsend states
9 that Hansen was also assigned a variety of marketing projects such
10 as developing individual clients' marketing based on an analysis of
11 customer base, demographic goals, and sales objectives. Id.

12 Hansen acknowledged at her deposition that she compiled
13 "targeting reports," Hallas Declaration, Exhibit A, Osborne
14 Declaration, Exhibit A (Hansen dep.) 71:17-73:19, helped with
15 market analysis projects, id. at 83:19-84:21; aided in "strategic
16 print buys," id. at 84:22-85:19, led team-building classes, sales
17 building exercises, and training on online market research
18 procedures, id. at 85:25-87:17; maintained client relations on
19 three large accounts, id. at 88:20-90:3, and produced "forecast
20 summaries" for the sales team, id. at 90:4-21. See also Reply
21 Declaration of Scott Osborne, Deposition Exhibit 8, (Hansen's
22 resume, listing experience obtained at Advo with these tasks);
23 Hansen dep. 69:1-25 (testimony about resume).

24 Approximately two weeks after Hansen began working for Advo,
25 Advo eliminated its voicemail system after Townsend received
26 complaints about it from Advo management, and Hansen was given the
27

1 job of answering the phones. Hansen has testified that she believes
2 she was given the task because she was female. Hansen dep. 99:16-
3 100:6. This belief is based on Hansen's testimony that every time
4 she called any of Advo's offices, a woman answered the phone.
5 Hansen Declaration ¶ 3. Hansen testified that she answered the
6 phone approximately 40 times a day. Hansen dep. 92:11-14.

7 Hansen testified that she was also required to clean the
8 office, dust, do "everybody's dishes," pick up coffee, run errands,
9 pick people up at the airport, get groceries for the office, and
10 buy supplies for meetings and birthday parties. Id. at 93:8-21.
11 According to Hansen, Townsend would "pick up the dishes and put
12 them in my office on my desk," and would scoop up anything lying on
13 the conference room table and toss it on her floor or her desk. Id.
14 at 94:15-18; 94:22-25. Hansen stated that Townsend would tell her
15 to ensure that the conference room was clean for sales meetings.
16 Id. at 95:18-24. She stated further that she had to "make
17 everyone's travel arrangements," id. at 96:3-5, but then admitted
18 that "most of the time" the sales team "did do their own" travel
19 arrangements. Id. at 96:18-97:1.

20 Defendants challenge the inference that Hansen was solely
21 responsible for office housekeeping and other mundane tasks.
22 Townsend states in his declaration that everyone in the office
23 "helped contribute to the upkeep of the office," and that he
24 himself "often washed coffee cups" and "often picked people up from
25 the airport for business meetings." Townsend Declaration ¶ 9.
26 Townsend states that although he sometimes asked Hansen to help
27

1 with travel arrangements, he also made travel arrangements for
2 himself "multiple times," and handled his own expense
3 reimbursements. Id. Townsend says he occasionally asked Hansen to
4 purchase supplies for the office, but that he also bought groceries
5 or coffee for the office. Id.

6 Ken Niebur states in his declaration that he frequently washed
7 coffee cups and helped keep the office's kitchen area clean;
8 frequently made his own travel arrangements; and frequently made
9 shopping trips to purchase coffee and other supplies for the
10 office. Niebur Declaration, ¶ 4. Niebur states that Hansen was "not
11 singled out to perform office chores." Id.

12 Richard Cronkrite says that because the Advo office was small,
13 all employees were "expected to assist with office tasks from time
14 to time," and that he frequently pitched in by cleaning up the
15 kitchen and common areas, as well as occasionally purchasing
16 supplies and groceries. Cronkrite Declaration ¶ 6. According to
17 Cronkrite, Hansen was not "singled out to perform these types of
18 tasks, although she was the only assistant in the office at that
19 time." Id.

20 Townsend states in his declaration that Hansen regularly
21 called in sick, left work early, or arrived late. Townsend
22 Declaration ¶ 4. Townsend has compiled a list, based on Advo's
23 attendance records, showing that between September 29, 2004 and
24 February 16, 2006, Hansen was absent 18 days; between 60 and 105
25 minutes late on eight occasions; and either left early or arrived
26 late on five other occasions. Id. Townsend states that he counseled
27

1 Hansen about her attendance in March 2004, May 2004, September
2 2004, and September 2005. Id. at ¶ 5, 6. According to Townsend,
3 Hansen's lack of attendance was an "obstacle to her receiving more
4 substantive marketing tasks," and "placed a strain on the sales
5 team." Id. at ¶ 8. Hansen contends that no one except Townsend told
6 her attendance was a problem, and that she arranged to have time
7 off for medical reasons. Hansen dep. 155:4-158:5; Hansen
8 Declaration ¶ 9. However, Advo counters that Hansen testified she
9 requested leave for medical reasons in July 2005, Hansen dep.
10 155:20-24, and that Townsend's log omits incidents occurring in
11 July or August 2005. See Townsend Declaration ¶ 4.

12 Niebur states in a declaration that he was "frustrated" by
13 Hansen's attendance, because she was "often late to work and
14 frequently called in sick." Niebur Declaration ¶ 3. Niebur says he
15 noticed an attendance pattern in which Hansen was absent from work
16 on days Townsend was out of the office, and that he expressed his
17 frustration with Hansen's attendance to Townsend. Id.

18 Cronkrite states in a declaration that Hansen performed her
19 job well when she was at work, but was frequently absent, and that
20 he expressed his frustration with Hansen's attendance to Townsend.
21 Cronkrite Declaration ¶ 5.

22 Hansen gave notice that she was leaving on February 14 or 16,
23 2006; her resignation letter is dated February 14, 2006, but there
24 is evidence that she tendered the letter to Townsend at a meeting
25 on February 16, 2006. According to Townsend, he was scheduled to
26 meet with Hansen to review attendance issues on February 16, 2006,
27

1 and Hansen "started out the meeting by submitting a letter of
2 resignation." Townsend Declaration ¶ 10. In her resignation letter,
3 Hansen said she had "decided to take a different path with her
4 career." Hansen dep. Exhibit 12. At the meeting with Townsend,
5 Hansen asked that her last day of employment be March 7, 2006.
6 Hansen dep. 174:22-24. Townsend states that at the meeting on
7 February 16, 2006, Hansen complained about her work
8 responsibilities; he responded that her attendance was an issue
9 underlying her not being assigned marketing tasks; and Hansen told
10 Townsend about offensive statements Fune had made to her. Id. See
11 also Hansen dep. 182:10-21. According to Townsend, this
12 conversation "was the first time I had heard of the allegations
13 regarding Roger Fune," and Townsend reported Hansen's concerns to
14 Advo's HR department, as well as advising Hansen to follow up with
15 HR on her own. Id.¹

16
17 ¹ Hansen asserts that in September or October 2005, she
18 complained about Townsend and Fune to Maxwell's predecessor,
19 Quock. According to her testimony, very early in her employment
20 she e-mailed Quock saying she was having problems at work with
21 Townsend, and "just an overall bad working environment" and asked
22 if Quock would call her on her cell phone at a certain time, so
23 that Fune would not overhear the conversation. Quock called her
24 and they talked for about half an hour. During the call, Hansen
25 told Quock about "Tim and the yelling and swearing that he would
26 do," e-mails Townsend would send out when people were late, and
27 about Fune "pretty much on a daily basis [making] inappropriate
28 comments." Hansen dep. 57:12-60:19. According to Hansen, Quock
promised an investigation, but never called anyone on Hansen's
team. Id. 60:20-61:24. The evidence indicates that Quock left
Advo sometime before Maxwell was hired, on December 2, 2005.
There is no evidence in the record that Townsend knew of Hansen's
complaints to Quock about himself and Fune. Nor is there any
evidence that Quock conducted an investigation of Hansen's
complaints at any time between September or October 2005 and his
departure from Advo at some date before December 2, 2005.

1 Townsend contacted the HR representative, Emanuel Maxwell.
2 Maxwell Declaration ¶ 10; Townsend Declaration ¶ 10. Maxwell
3 contacted Hansen by telephone the evening of her resignation, see
4 Hansen dep. 183:22-24; 189:18-25, to begin an investigation into
5 her complaint. Maxwell Declaration ¶ 10.

6 Hansen's allegations of misconduct against Fune are:

7 1. Fune called Hansen into his office and showed her a
8 website depicting a T-shirt with an outline of a woman on
9 a gynecologist's examining table, with the doctor's head
10 between her knees, and saying, "Best view in town."
11 Hansen dep. 130:10-20.

12 2. On the second day of Fune's employment at Advo, Townsend
13 was talking to Hansen and Fune about communication
14 techniques used on customers by a good salesperson, and
15 Fune said, "You have to do like Jedi mind tricks with
16 them, like women," or something similar. Hansen dep.
17 128:16-23.

18 3. When a loose hair had fallen on Hansen's shirt, Fune
19 reached out as though to grab it, within a few inches of
20 her breast. Fune told Hansen he was not trying to fondle
21 her; he was trying to remove a hair. Hansen herself
22 removed the hair from her shirt. Hansen dep. 141:3-13.

23 4. Fune returned from a sales call and told Hansen he should
24 have taken her on the call because of her appearance.
25 Maxwell Declaration, Exhibit D; Hansen dep. 152:21-153:7.

26 5. During the summer of 2005, Fune made a suggestive comment
27

1 about the uniforms his daughter's volleyball team wore.
2 Hansen dep. 148:2-6; Maxwell Declaration, Exhibit D.

3 6. Hansen felt she was working in a "boys club environment"
4 because Fune had taken male employees into his office to
5 show them things on the Internet, and because Townsend
6 scheduled a golf event on a day Hansen had asked to take
7 off from work. Maxwell Declaration, Exhibit D; Hansen
8 dep. 188:1-12.

9 7. On an Advo business trip to Seattle in 2005, Fune joked
10 that he would go to a strip club after dinner; during
11 dinner he positioned himself at the restaurant table so
12 he could see a music video on TV, referring to "hot
13 girls" and "soft core porn." Maxwell Declaration, Exhibit
14 D; Hansen dep. 77:16-24.

15 8. Fune would "talk about women and their body parts,"
16 although Hansen could provide no details of these
17 comments. Hansen dep. 61:12-18; 136:2-16; 151:3-22.

18 9. In July 2005, Fune commented to Hansen that his
19 daughter's 13 and 14 year old friends had large breasts
20 and he thought it was a tease to someone his age because
21 he couldn't tell how old they were. Hansen dep. 138:3-9.

22 10. In the fall of 2005, Hansen heard "female sex sounds"
23 coming from Fune's computer speakers. Hansen dep. 146:14-
24 18.

25 11. Around December 2005, Fune told Hansen a woman in the
26 building was trying to get his attention because she
27

1 would regularly walk past his office window and stick her
2 chest out. Hansen dep. 138:22-139:4.

3 12. In December 2005, on a team building trip to Park City,
4 Utah, Fune pointed out a bumper sticker that said, "I
5 love head." Hansen dep. 169:1-5.²

6 The day after tendering her resignation letter, on February
7 17, 2006, Hansen sent an e-mail to the other employees of the
8 Portland office saying she had "decided to go back to school and
9 work towards my Masters in Business," Hansen dep. Exhibit 13,³ and
10 saying,

11 [I]t is important to me that I pass on my appreciation
12 for just how much I learned and how valuable this
13 experience was [G]etting to know each of you has
14 been wonderful. It is nice knowing that there are
15 companies out there, like Advo, that are made up of such
16 wonderful, hard working and loyal people. I truly will
17 miss working with all of you.

18 Id. Hansen states in her declaration that she was "instructed to
19
20

21 ² According to Fune's deposition testimony, the bumper
22 sticker said, "I love Head Skis." Fune dep. 48:2-6. Fune
23 testified that he told the driver of the van, "I can't believe
24 that guy has it on his car." Id. 48:7-9. Fune did not remember
25 Hansen saying anything about that. 48:10-12.

26 ³ Hansen does not deny that before submitting her
27 resignation, she had purchased books to prepare for graduate
28 course work, signed up for two classes at PSU, including one
29 class that met during the day, and sought out part-time
30 employment that would work with a school schedule. Defendant's
31 CSF 12. Nor does Hansen deny that approximately three weeks after
32 resigning her employment with Advo, Hansen began taking graduate
33 classes and obtained part-time employment that accommodated her
34 school schedule. Defendant's CSF 18. Hansen testified at her
35 deposition that she applied to PSU before she resigned from Advo,
36 and that school was set to begin the last week of March. Hansen
37 dep. 173:10-24. She had signed up for two classes, which met from
38 3:00-5:00 p.m. and from 5:45-9:00 p.m. Id. at 173:25-174:21.

1 write this email," Hansen declaration ¶ 11, but also that she
2 "chose to be gracious and professional rather than focus on the
3 negative aspects of my departure." Id. In her deposition, Hansen
4 testified that Townsend had told her to send an email about her
5 leaving to everyone Hansen had regular contact with in Advo, and to
6 "make Advo look good." Hansen dep. 199:10-20.

7 Maxwell and another HR representative, Jesus Alvaredo, flew to
8 Portland on February 24, 2006, to interview the office staff.
9 Maxwell Declaration, Exhibit D (Maxwell's investigation report).
10 Maxwell and Alvarado met with each Portland office employee.
11 Maxwell Declaration ¶ 13.

12 Maxwell states that Fune denied behaving in an inappropriate
13 manner toward Hansen. Maxwell Declaration ¶ 14. Maxwell interviewed
14 all the other employees of the Portland office, and concluded that
15 he was unable to substantiate Hansen's complaints. Maxwell
16 Declaration ¶¶ 15, 17, Exhibit D.⁴

17 Fune testified at his deposition that the only internet sites
18 he visited while at Advo were MSNBC, ESPN and a weather site,
19 NOAA.gov. Crabtree Declaration Exhibit A (Fune dep.) 35:16-36:8. He
20

21
22 ⁴ Hansen claims in her testimony that Townsend heard Fune's
23 "Jedi" comment, see Hansen dep. 127:12-19, and did nothing.
24 Hansen dep. 127:4-9. Hansen testified further that Fune would
25 talk about movies he had seen over the weekend, including the
26 attractiveness of the different women in the movies and
27 descriptions of sex scenes, but she was unable to give any
specific examples. Hansen dep. 151:3-22. Hansen says Townsend was
"always present" when these comments were being made. Id. at
151:25-152:1. In her papers, Hansen does not cite any other
evidence that Townsend knew of Fune's allegedly offensive
behavior toward her and did nothing.

1 denied ever showing Hansen or anyone else in the office anything on
2 his computer. Id. at 36:9-14. Maxwell states in his declaration
3 that as part of his investigation, he reviewed Fune's computer and
4 Internet history, and was unable to confirm Hansen's allegations.
5 He found no inappropriate Internet usage on Fune's computer.
6 Maxwell Declaration ¶ 16. However, there is some evidence that Fune
7 got a new laptop at some point during his employment.

8 Fune states in a declaration that he and Hansen had a cordial
9 business relationship, sharing daily cigarette breaks. Fune
10 Declaration ¶ 3. Fune states that once Hansen confided in him that
11 she thought a friend's husband was making sexual advances toward
12 her. Id. According to Fune, during out-of-town trips, he and Hansen
13 went out to bars together and, on one occasion, she borrowed Fune's
14 boxer shorts so that she could get in a hot tub with Fune and the
15 rest of the Portland team. Id. at ¶ 4. Fune states that he never
16 saw Hansen outside of work or asked to do so. Id.

17 According to Fune's declaration, Hansen once asked Fune if he
18 had made a comment about her body, and Fune did not recall ever
19 making such a comment and told her so. Id. at ¶ 5.

20 Fune states that he never had any indication from Hansen that
21 she believed he had engaged in offensive conduct, and that the
22 first time he learned of Hansen's claims of sexual harassment was
23 during the HR interview. Id. at ¶¶ 7, 9. According to Fune's
24 deposition testimony, Hansen said to him a couple of times that he
25 had "crossed a line," but "every time she said it she was laughing
26 and she always said it like she was giving the punch line to a
27

1 joke." Fune dep. 46:24-47:1.

2 Fune states that the day of the HR investigation, Hansen
3 professed ignorance about what Advo might be investigating, and
4 that shortly before Hansen was interviewed, Fune went to get a
5 bagel and offered to bring Hansen one, which she accepted. Fune
6 states that on the day of the investigation, he and Hansen shared
7 cigarette breaks. Id. ¶ 6.

8 Fune asserts that the comment about his daughter's volleyball
9 uniform was a complaint about how short the shorts were. Fune
10 Declaration ¶ 8. At his deposition, Fune testified that his
11 daughter's volleyball team was in "these spandex shorts and I
12 didn't like them." Hallas Declaration, Exhibit C (Fune dep.) 43:4-
13 17. Fune disputes Hansen's suggestion that Fune said he should take
14 her on sales calls because of her appearance; he claims that at the
15 start of his employment with Advo, he told Townsend it would "have
16 been nice to have Darcie on my sales call because she was a good
17 resource for information." Fune Declaration ¶ 8. Fune denies
18 anything sexual in the comment.

19 Niebur states in a declaration that at the time of the HR
20 investigation, he was surprised about Hansen's allegations because
21 "Darcie never appeared uncomfortable working around Roger." Niebur
22 Declaration ¶ 5. Cronkrite states in a declaration that he never
23 heard Fune say anything "sexually inappropriate" to Hansen and
24 never saw him act in a "sexually inappropriate" way toward her.
25 Cronkrite Declaration ¶ 3. Cronkrite says he never saw Fune access
26 sexually inappropriate material on his office computer. Id.

27

28 OPINION AND ORDER Page 14

1 Cronkrite states that Hansen never suggested that she felt
2 uncomfortable working around Fune. Id. at ¶ 4.

3 Hansen continued to work at the Advo office through February
4 24, 2006. Hansen dep. 192:14-193:6; Maxwell Declaration ¶ 17.
5 Maxwell states in his declaration that Hansen told him she felt
6 uncomfortable in the office, and that he inquired of Hansen what
7 Advo could do to make her comfortable. Maxwell Declaration ¶ 17.
8 Hansen indicated to Maxwell that she no longer wanted to work at
9 Advo. Maxwell Declaration ¶ 17.

10 Hansen asserts that she did not want to work from home, but
11 was forced to do so for the last two weeks of her employment as
12 retaliation for her complaints. This assertion is not fully
13 supported by Hansen's actual deposition testimony:

14 Q: So you finished the meeting with Emanuel [Maxwell]
15 and the other HR guy?

16 A: Right.

17 Q: Did you go back to your office?

18 A: I was just walking out the door, and Tim [Townsend] was
19 right there, and he said, "Are you uncomfortable?" and I
20 said, "Yeah. Who wouldn't be?" and then I walked back to
21 my office, and Tim went in to talk with them.

22 Q: Okay.

23 A: Tim was in there for 20 minutes or so, probably, and when
24 he came out ... they called me back in and sat me down,
25 and they said, "We're going to have you work from home
26 for the last few weeks. It will be great. A lot of people
27 like working from home. They get to wear their pajamas,"
28 blah, blah, blah. It was, like, "I'm going to take you
back to your office so you can pack up your things."

I was physically in shock at that point. I had no words.
Emanuel walked me back to my office, and I was cleaning
out my drawer, and he came in, and he shut the door
behind him, and he said, "How are you feeling about the

1 way things have gone?" and I said, "Actually, I am really
2 mad," and I did start to cry. My lip was quivering. I was
3 really uncomfortable. And he said, "You're mad?" and
4 questioned that, and I replied and said, "Yeah. It took
5 a lot to give you guys examples of everything that
6 happened and try to do the right thing, and I feel like
7 I'm being made to look like the bad guy. I'm being sent
home. I don't want to work from home," and he said,
"Well, do you still want to work here?" and I said, "No,
not now," and he said, "Well, we probably would be
handling things different [sic] if you still wanted your
job."

Hansen dep. 194:14-195:24.

Hansen testified that she left the office and did not return.
While at home, she "sat by my computer and waited and sent e-mails"
to Townsend but did not hear from him. Hansen dep. 196:6-197:7.
This testimony is contradicted by a string of e-mails between
Hansen and Maxwell.

Hansen sent Maxwell an e-mail dated Wednesday, March 1, 2006,
saying Townsend had sent out two notices that he was sick and a
third saying he was out traveling for the rest of the week. Hansen
wrote, "This leaves me no time to get into contact with him. While
he has excuses, they all seem very convenient." Maxwell
Declaration, Exhibit E. Hansen continued that she had left a
voicemail asking Townsend to call her on Monday (presumably, the
preceding Monday, February 27, 2006). Id.

Maxwell responded to Hansen's e-mail the same day, March 1,
2006, saying he would ask Townsend to call Hansen immediately. Id.
Maxwell did so; Townsend responded via e-mail, also dated March 1,
2006, saying he had been sick for the previous four days, and had
notified Hansen and other employees of his illness via e-mail. Id.
Townsend also said that on the morning of March 1, 2006, he had

1 traveled to Seattle and worked on projects there. Id. Townsend
2 wrote, "As for projects ... I do not have anything for her at this
3 time but will check when I get back to the Portland office on
4 Friday." Id. Townsend then sent Hansen a list of things to do,
5 including an Advo "go to" list, a list of outstanding projects she
6 was working on, and a process description of how sales forecasting
7 worked, to be used as a teaching tool for her replacement and a
8 reference tool for other associates. Id. On March 2, 2006, Townsend
9 sent another e-mail asking Hansen to e-mail a vacation file to him.
10 Id. Hansen sent Maxwell an e-mail on March 2, 2006, acknowledging
11 that she had received an e-mail from Townsend listing tasks he
12 wanted completed, and saying she was working on them. Id. Hansen's
13 pay was not decreased during the time she was working at home.

14 **Standard**

15 A party is entitled to summary judgment if the "pleadings,
16 depositions, answers to interrogatories, and admissions on file,
17 together with affidavits, if any, show there is no genuine issue as
18 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is
19 not proper if material factual issues exist for trial. Warren v.
20 City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A genuine
21 dispute arises "if the evidence is such that a reasonable jury
22 could return a verdict for the nonmoving party." State of
23 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). Where
24 the record taken as a whole could not lead a rational trier of fact
25 to find for the non-moving party, there is no genuine issue for
26 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.

1 574, 587 (1986).

2 On a motion for summary judgment, the court must view the
3 evidence in the light most favorable to the non-movant and must
4 draw all reasonable inferences in the non-movant's favor. Clicks
5 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir.
6 2001). The court may not make credibility determinations or weigh
7 the evidence. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S.
8 133, 150 (2000). Where different ultimate inferences may be drawn,
9 summary judgment is inappropriate. Sankovich v. Ins. Co. of N. Am.,
10 638 F.2d 136, 140 (9th Cir. 1981).

11 Discussion

12 A. Sex Discrimination Claim

13 1. Was Hansen subjected to actionable harassment?

14 A claim for sex discrimination based on hostile work
15 environment, under Title VII or Or. Rev. Stat. § 659A.030, requires
16 a plaintiff to show that the workplace was "permeated with
17 discriminatory intimidation, ridicule and insult," that was
18 sufficiently severe or pervasive to alter the conditions of her
19 employment and create an abusive working environment. Harris v.
20 Forklift Systems, Inc., 510 U.S. 17, 21 (1993); Mains v. II Morrow,
21 Inc., 128 Or. App. 625, 634 (1994). The standard is both subjective
22 and objective: the victim must perceive the environment as abusive,
23 and the environment must be one that a reasonable person would find
24 hostile or abusive. Faragher v. City of Boca Raton, 524 U.S. 775,
25 787 (1998); Nichols v. Azteca Restaurant Enterprises, Inc., 256
26 F.3d 864, 871 (9th Cir. 2001). In addition, plaintiff must prove

1 that any harassment took place "because of sex." Oncale v.
2 Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); Nichols,
3 256 F.3d at 872. See also Garcez v. Freightliner Corp., 188 Or.
4 App. 397, 408 (2003).

5 Factual circumstances relevant to this showing include "the
6 frequency of the discriminatory conduct; its severity; whether it
7 is physically threatening or humiliating, or a mere offensive
8 utterance; and whether it unreasonably interferes with an
9 employee's work performance." Harris, 510 U.S. at 23; Garcez, 188
10 Or. App. at 408.

11 Advo contends that even if each of Hansen's allegations of
12 misconduct against Fune is accepted, in the aggregate they do not
13 rise to the level of severity or pervasiveness necessary to make
14 out a claim for hostile environment sexual harassment. See Harris,
15 510 U.S. at 21 ("Conduct that is not severe or pervasive enough to
16 create an objectively hostile or abusive work environment--an
17 environment that a reasonable person would find hostile or
18 abusive--is beyond Title VII's purview.") Advo argues that the
19 "severe or pervasive" standard is designed to exclude "the ordinary
20 tribulations of the workplace, such as the sporadic use of abusive
21 language, gender-related jokes, and occasional teasing." Faragher,
22 524 U.S. at 786.

23 Workplace harassment, even harassment between men and women,
24 is not automatically discrimination because of sex "merely because
25 the words used have sexual content or connotations." Oncale, 523
26 U.S. at 79. Rather, the plaintiff must always prove that the
27

1 conduct at issue was "not merely tinged with offensive sexual
2 connotations, but actually constituted discrimination because of
3 sex." Id. See also Candelore v. Clark County Sanitation Dist., 975
4 F.2d 588, 590 (9th Cir. 1992) (isolated incidents of sexual horseplay
5 or inappropriate behavior not so egregious as to render work
6 environment hostile); Jordan v. Clark, 847 F.2d 1368, 1374-75 (9th
7 Cir. 1988) (off-color jokes told at work did not constitute abusive
8 environment); Benitez v. PGE, 799 F. Supp. 1075, 1080-81 (D. Or.
9 1992) (sporadic comments or incidents of harassment, without more,
10 will not support a hostile environment claim); Kortan v. California
11 Youth Authority, 217 F.3d 1104 (9th Cir. 2000) (although supervisor's
12 sexually related comments about women were offensive, his conduct
13 was not frequent, severe or abusive enough to interfere
14 unreasonably with plaintiff's employment; offensive conduct was
15 concentrated on one occasion, occurred in the wake of a dispute,
16 and comments were about other people); Shepherd v. City of Salem,
17 320 F. Supp.2d 1049, 1057-58 (D. Or. 2004) (supervisor hugged and
18 "rubbed up" against female employees, offered to adjust employee's
19 blouse, commented that he liked employees' short skirts, and
20 commented to employees about female customers' hips and breasts).

21 Hansen asserts that during her employment at Advo, she was
22 subjected to an "unwelcome constant barrage of offensive comments
23 of a sexual nature." She relies on her own characterization of
24 Fune's behavior as "constant," and "daily," and her own testimony
25 that she continually told Fune he was "crossing the line." But the
26 mere conclusory assertion that conduct was constant is not

1 sufficient to prove pervasiveness, in view of the paucity of
2 Hansen's specific examples of such conduct. As Advo points out, on
3 a motion for summary judgment, Hansen is required to come forward
4 with specific facts which show there is a genuine issue for trial,
5 and Hansen is required to provide sufficient detail to "enable a
6 reasonable trier of fact to conclude that discrimination has
7 occurred." McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1113 n. 5
8 (9th Cir. 2004).

9 Further, as Advo points out, the conduct was not "severe," as
10 that term is used in sexual harassment cases: Hansen does not
11 allege that Fume propositioned her, touched her inappropriately,
12 expressed any romantic or sexual feelings toward her, threatened or
13 insulted her, called her names, stalked her, or used offensive
14 language toward her. The conduct alleged against Fune is neither
15 severe nor pervasive enough to constitute sexual harassment. The
16 hostile environment sexual harassment claim is dismissed.

17 2. Was Hansen subject to sex discrimination in her job
18 duties?

19 The legal framework for considering summary judgment in a
20 disparate treatment discrimination case is that established by
21 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g.,
22 Chuang v. Univ. of Calif. at Davis, 225 F.3d 1115, 1123 (9th Cir.
23 2000). The federal burden-shifting analysis also applies to
24 discrimination claims under Oregon statutes. Snead v. Metropolitan
25 Property & Cas. Co., 237 F.3d 1080, 1093 (9th Cir. 2001).

26 Under McDonnell Douglas, Hansen must first establish a prima
27 facie case of discrimination. Vasquez v. County of Los Angeles, 349

1 F.3d 634, 640 (9th Cir. 2003). If she succeeds in doing so, the
2 burden shifts to Advo to articulate a legitimate, nondiscriminatory
3 reason for its allegedly discriminatory conduct. Id. If it does so,
4 Hansen must show that the articulated reason is pretextual "either
5 directly by persuading the court that a discriminatory reason more
6 likely motivated the employer or indirectly by showing that the
7 employer's proffered explanation is unworthy of credence." Texas
8 Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

9 a. Prima facie case

10 A prima facie case of discrimination under McDonnell Douglas
11 requires Hansen to show that 1) she belongs to a protected class;
12 2) she was performing according to her employer's legitimate
13 expectations; 3) she suffered an adverse employment action; and 4)
14 similarly situated employees outside her protected class were
15 treated more favorably, or other circumstances surrounding the
16 adverse employment action give rise to an inference of
17 discrimination. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220
18 (9th Cir. 1998). Advo moves against this claim on the grounds that
19 Hansen cannot show that she suffered an adverse employment action,
20 or that similarly situated male employees were treated more
21 favorably.

22 b. Adverse employment action

23 In this jurisdiction, a wide array of disadvantageous changes
24 in the workplace can constitute adverse employment actions. Ray v.
25 Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000). Nevertheless, Hansen
26 has pointed to no evidence that Advo inflicted any such
27

1 disadvantageous changes on her. There is no evidence that Hansen
2 was terminated, demoted or not promoted, disciplined, suffered a
3 reduction in pay, received an unfavorable employee review, was
4 transferred, or had job duties taken away.

5 Hansen asserts that she has met her prima facie case by
6 showing that she was "reassigned" to administrative duties based on
7 her gender, arguing that she was hired as a "sales and marketing
8 assistant" rather than an "administrative assistant" and told she
9 would be doing sales and marketing, not menial administrative tasks
10 such as answering phones and washing coffee cups.

11 While there is authority that transfers of job duties can
12 constitute adverse employment actions, see, e.g., Yartzoff v.
13 Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (transfer of job duties
14 away from plaintiff), Hansen cites to no legal authority suggesting
15 that misrepresentations at a job interview about the importance of
16 her position or the number of interesting tasks she would be
17 assigned is actionable as sex discrimination. The evidence
18 establishes that Hansen, who was in her early twenties at the time
19 of her employment, was hired as an "assistant," to work in the
20 office with Townsend, while all the other Portland office employees
21 worked as salesmen.

22 But even if Hansen could show that assigning her to such
23 duties as answering the phone, washing most of the dishes, and
24 making travel arrangements for other people, instead of allowing
25 her to pursue sales and marketing tasks exclusively, was an adverse
26 employment action, Hansen's prima facie case founders on the

1 absence of a male comparator.

2 c. Similarly situated male employee

3 To be considered "similarly situated, the other employee's job
4 must be similar to the plaintiff's in all material respects." Moran
5 v. Selig, 447 F.3d 748, 755 (9th Cir. 2006). There is no evidence
6 in the record of the existence of a male employee whose job was
7 similar to Hansen's in all material respects, and who was treated
8 differently. The absence of a male comparator is fatal to Hansen's
9 prima facie case of discrimination.

10 Because Hansen has not made out a prima facie case, I do not
11 reach Advo's articulation of a legitimate nondiscriminatory reason
12 for its actions, although on this record, Advo also would be
13 entitled to summary judgment on the ground that Hansen has not
14 carried her burden of showing that Advo's proffered explanations
15 for Hansen's job duties--that the automated phone system was
16 discontinued because of complaints, that Hansen was the only
17 assistant in the office, and that the menial tasks of which she
18 complains were shared by all the others in the office, including
19 the manager-- were pretextual. Hansen's sex discrimination claim is
20 dismissed.

21 3. Was Hansen constructively discharged because of a hostile
22 work environment?

23 Although a determination of constructive discharge is normally
24 a factual question, see Poland v. Chertoff, 494 F.3d 1174, 1184 (9th
25 Cir. 2007), constructive discharge based on Title VII is based on
26 an objective inquiry: Did working conditions become so intolerable
27 that a reasonable person in the employee's position would have felt

1 compelled to resign? Pennsylvania State Police v. Suders, 542 U.S.
2 129, 147 (2004). This standard requires of plaintiff a burden of
3 proof more onerous than the "severe or pervasive" standard of
4 sexual harassment. Id. Unless conditions are "beyond ordinary
5 discrimination, a complaining employee is expected to remain on the
6 job while seeking redress." Id. (internal quotation and citation
7 omitted). In Poland, the court held that constructive discharge
8 occurs when

9 the working conditions deteriorate, as a result of
10 discrimination, to the point that they become
11 sufficiently extraordinary and egregious to overcome the
12 normal motivation of a competent, diligent, and
13 reasonable employee to remain on the job to earn a
14 livelihood and to serve his or her employer.

15 Poland, 494 F.3d at 1184. As the Poland court observed, the law

16 set[s] the bar high for a claim of constructive discharge
17 because federal antidiscrimination policies are better
18 served when the employee and employer attack
19 discrimination within their existing employment
20 relationship, rather than when the employee walks away
21 and then later litigates whether his employment situation
22 was intolerable.

23 Id.

24 In Poland, the court held that plaintiff had not, as a matter
25 of law, shown that he was constructively discharged because neither
26 the court's factual findings nor any other evidence in the record
27 indicated that plaintiff's working conditions were "so poor that
28 they trumped his motivation to earn a living." 494 F.3d at 1185.
Hansen has not made out a constructive discharge claim based upon
her assignment to office assistant job duties. See, e.g., Poland,
494 F.3d at 1185 ("constructive discharge cannot be based upon the
employee's subjective preference for one position over another.")

1 Nor, having failed to demonstrate that Fune's alleged misconduct
2 was either severe nor pervasive enough to constitute sexual
3 harassment, can Hansen satisfy the heavier burden of proving that
4 her working conditions were so intolerable that a reasonable person
5 would have felt compelled to resign, particularly when, as here,
6 the record contains evidence that Hansen's motivation in quitting
7 her job was the desire to resume her education.

8 Hansen's sex discrimination claim based on constructive
9 discharge is dismissed.

10 B. Retaliation Claim

11 To establish a claim of retaliation, Hansen must show that 1)
12 she engaged in protected activity; 2) she suffered an adverse
13 employment action; and 3) there was a causal link between the
14 protected activity and the adverse employment action. Poland, 494
15 F.3d at 1180; Villarimo v. Aloha Is. Air, Inc., 281 F.3d 1054, 1064
16 (9th Cir. 2002). At the prima facie stage, the causal link element
17 is construed broadly, so that a plaintiff merely has to prove that
18 the protected activity and the negative employment action are not
19 completely unrelated. Poland, 494 F.3d 1181, n. 2. Advo does not
20 dispute that Hansen's complaints about Fune, whether made to Quock
21 or to Townsend, constitute protected activity.

22 An adverse employment action is "any adverse treatment that is
23 based on a retaliatory motive and is reasonably likely to deter the
24 charging party or others from engaging in protected activity."
25 Poland, 494 F.3d at 1180; Ray, 217 F.3d 1234, 1242-43. Advo asserts
26 that Hansen has not demonstrated that she suffered an adverse
27

1 employment action. I agree.

2 Hansen's assignment to the duties of an administrative
3 assistant cannot constitute an adverse employment action because
4 the assignment was not a "disadvantageous change" in her
5 employment, and, even if it were, Hansen has not produced any
6 evidence that assigning her to those duties was in retaliation for
7 protected activity. Hansen contends that she was assigned to the
8 duties of an administrative assistant from the beginning of her
9 employment, before she complained to Quock, Townsend, or Maxwell.

10 Although Hansen asserts that being told to work at home after
11 Maxwell arrived to investigate her complaints about Fune was an
12 adverse employment action, this assertion is unpersuasive. Hansen
13 had already tendered her resignation before she was told to work at
14 home; further, there is evidence in the record that Hansen
15 expressed discomfort with continuing to work in the office after
16 she made her complaints. In view of this evidence, Hansen has not
17 demonstrated that working at home for the last two weeks of her
18 employment, with the same salary and benefits, was an adverse
19 employment action. Hansen argues that being made to work at home
20 would deter other employees from complaining about sexual
21 harassment, but in view of the evidence that she had already
22 resigned and had expressed discomfort with remaining in the office,
23 no reasonable jury could conclude that being told to work at home
24 constituted an adverse employment action taken in retaliation for
25 Hansen's complaints in February 2006. Assuming the truth of
26 Hansen's contention that she had made earlier complaints about Fune
27

1 to Quock, there is no evidence of any adverse employment action
2 taken against her as a result of these complaints; Hansen's only
3 contention is that Quock failed to investigate her complaints, and
4 this is not an adverse employment action against Hansen.

5 Hansen's retaliation claim is dismissed.

6 C. Intentional Infliction of Emotional Distress Claim

7 A claim for intentional infliction of emotional distress
8 requires the plaintiff to show 1) an intent by defendant to inflict
9 to inflict severe emotional distress on the plaintiff; 2) that
10 defendant's acts caused plaintiff severe emotional distress, and 3)
11 that defendant's acts constituted an extraordinary transgression of
12 the bounds of socially tolerable conduct. McGanty v. Straudenraus,
13 321 Or. 532, 543 (1995). What constitutes an extraordinary
14 transgression of the bounds of socially tolerable conduct is a
15 question of law. Harris v. Pameco Corp., 170 Or. App. 164, 171
16 (2000).

17 Advo asserts that the record before the court provides no
18 basis from which to find that the conduct of Advo, its managers or
19 its employees was outrageous. I agree. Nor does the record before
20 the court demonstrate an intent by Advo to inflict severe emotional
21 distress on Hansen. Hansen's claim for intentional infliction of
22 emotional distress is dismissed.

23 D. Punitive Damages Claim

24 Advo moves against Hansen's claim for punitive damages,
25 asserting that she has not produced evidence showing that Advo
26 engaged in discriminatory conduct with malice or with reckless
27

1 indifference to her federally protected rights, citing Kolstad v.
2 American Dental Society, 527 U.S. 526 (1999). Advo argues that
3 Hansen must show that it acted with "knowledge that its actions may
4 have violated federal law," or with disregard by "showing that the
5 defendant's employees lied ... in order to cover up their
6 discriminatory actions." Id. at 535.

7 Advo points to the evidence that it has adopted an anti-
8 harassment policy, see Defendant's CSF 21, and implemented the
9 policy in good faith. Id.; see also Maxwell Declaration ¶ 3.

10 Hansen counters that she has presented evidence that Townsend
11 "did nothing to stop the harassment she experienced despite
12 repeated complaints and being present for some of the inappropriate
13 comments." But there is no evidence that Hansen ever complained to
14 Townsend about harassment until the February 16, 2006 meeting.
15 Hansen does not dispute that immediately after Hansen complained to
16 Townsend about Fune on February 16, 2006, Townsend called Maxwell
17 at HR, Maxwell contacted Hansen, and Maxwell began investigating
18 the complaints.

19 Hansen also relies on her complaint to Quock. This single
20 episode does not constitute "repeated" complaints, and Quock's
21 failure to investigate Hansen's complaint about Townsend and Fune
22 during the two months or so that remained of his employment with
23 Advo is not conduct sufficient to create a genuine issue of
24 material fact in support of Hansen's claim for punitive damages.
25 Regardless of whether Quock's failure to respond to a complaint by
26 Hansen constituted inadequate implementation of Advo's

1 antidiscrimination policy, it does not constitute the kind of
2 malicious or reckless of behavior that justifies punitive damages.

3 The claim for punitive damages is stricken.

4 E. Motion to Strike

5 Advo has filed objections to some of Hansen's evidence. I have
6 considered those objections and my rulings on those objections are
7 reflected in this Opinion and Order.

8 **Conclusion**

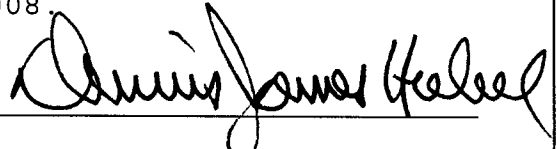
9 Defendant's motion for summary judgment (doc. # 17) is
10 GRANTED.

11 IT IS SO ORDERED.

12

13 Dated this 25th day of March, 2008.

14

A handwritten signature in black ink, appearing to read "Dennis James Hubel", is written over a horizontal line.

15

Dennis James Hubel

16

United States Magistrate Judge

17

18

19

20

21

22

23

24

25

26

27

28 OPINION Page 30